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No. 82-1007

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

JOHN F. NIESZNER,

Petitioner,

v.

DR. VERN ORR, SECRETARY OF THE AIR FORCE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

LARKIN, HOFFMAN, DALY & LINDGREN, Ltd.

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QUESTION PRESENTED FOR REVIEW

Whether a serviceman's challenge to the application of a military regulation which excludes him from an officers' program solely on the basis of age presents a justiciable issue for review by the Federal Courts under unreconciled decisions in the Second, Third, Fifth, Eighth, Ninth, and Tenth Circuits based upon the equal protection and due process clauses of the Fifth Amendment to the United States Constitution?

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IN THE

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No.

JOHN F. NIESZNER,

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DR. VERN ORR, SECRETARY OF THE AIR FORCE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, John F. Nieszner, prays that a Writ of Certiorari issue to review a decision of the United States Court of Appeals for the Eighth Circuit, affirming

a decision of the United States District Court for the District of Minnesota. The decision of the Court of Appeals holds that the District Court improperly determined that Petitioner's challenge of Air Force Regulation 36-15, as discriminating on the basis of age, presented a nonjusticiable claim.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 684 F.2d 562, is set out in Appendix E to this Petition.[1] The Memorandum Order of the District Court is unreported and set out in Appendix D. The findings by the Air Force in response to Petitioner's Complaint are set out in the letter of Colonel Jerry D. Oberhelman, Appendix C. The initial finding of

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[1] The opinion below is entitled Nieszner v. Mark. Dr. Vern Orr has since become the Secretary of the Air Force and, therefore, the respondent in this case.

ineligibility is set out in the letter of Lt. Lloyd H. Miller and its artifact in Appendices A and B.

JURISDICTION

The opinion of the Court of Appeals was rendered on July 21, 1982. There was no request for a rehearing before the Court of Appeals. On request of Petitioner, an extension of time to file the within Petition was granted until November 18, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The constitutional provision involved are the equal protection and due process clauses of the Fifth Amendment to the United States Constitution set out in Appendix G to this Petition, as applied to the power of the United States Federal Courts to review military employment

issues. Air Force Regulation 36-15, Paragraph 2-14 is set out in Appendix F.

STATEMENT OF THE CASE

Petitioner, John F. Nieszner, a Technical Sergeant in the United States Air Force Reserve, applied for a position in the Outstanding Air Force Commissioning Program (hereinafter "the Program"), in 1974. Of seventeen (17) applicants, he was in the top four (4). He was informed there were not enough positions open at that time but that he should reeapply at a later date when positions were available. Thereafter, Petitioner was informed that no positions were open in the Program. Nieszner was refused permission to apply for the Program in 1978, the next time there was an opening, because he was by that time over the age of thirty-five (35). He was, however, advised that his qualifications were "excellent" (Appendix A). Air Force Regulation (hereinafter

"AFR") 36-15, however, provided that an applicant for the Program must be under thirty-five (35) years of age before receiving his first commission. The sole reason given by the Air Force for refusing Petitioner's request to apply to the Program was that he was thirty-six (36) years old at the time of his request.

Petitioner presented outstanding credentials, fulfilling all other qualifications required by AFR 36-15. The first requirement was a four-year college degree. Petitioner possessed both a Bachelor's Degree and a Master's Degree. Second, the regulation required an acceptable score on the Air Force Officer's Qualification Test. Petitioner passed the test. The third requirement was completion of the Air Force Officer Preparatory Course. Petitioner successfully completed the course. In addition, he was a Non-Commissioned Officer Academy Honor

Graduate ranking number one in his one hundred eight (108) person class, and had a record of perfect attendance in his fourteen (14) years of service in the Air Force Reserve. In short, his qualifications were "excellent" (Appendix A).

Petitioner has exhausted all administrative remedies available to him. Initially, he pursued an age discrimination grievance through Air Force channels. Petitioner was informed that the Air Force did not consider age qualifications discriminatory. Petitioner pursued further redress through the office of the United States Air Force Reserve Inspector General. Col. Oberhelman informed him that the Inspector General Complaint System, AFR 123-11, did not provide for the processing of complaints concerning Air Force Regulations. (Appendix C).

On September 22, 1980, Petitioner instituted suit in the United States

District Court for the District of Minnesota against the Air Force alleging a violation of his Constitutional rights. Respondent moved for dismissal or summary judgment and a hearing was held September 4, 1981. The Honorable Donald D. Alsop dismissed Petitioner's Complaint without reaching the merits of his contentions or the legal arguments raised on the ground that the decision of the military officials did not present a justiciable question. (Appendix D). Petitioner appealed to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals affirmed the dismissal by the District Court holding that Petitioner presented a nonjusticiable issue. (Appendix E).

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari in this case because the decision of the Eighth Circuit Court of Appeals, based

primarily upon the analysis of a decision of the Fifth Circuit conflicts with the Third Circuit Court of Appeals on the issue of the justiciability of the challenge to military regulations. This Court simply has not provided clear guidance on how to proceed in determining the extent to which the judiciary should inquire into military matters. The split which has developed in the circuits with respect to this issue must be resolved by this Court. Accordingly, this Court should grant certiorari.

I.

THE FEDERAL COURTS OF APPEALS HAVE RENDERED CONFLICTING AND UNRECONCILED DECISIONS WHICH REQUIRE RESOLUTION ON THE JUSTICIABILITY OF CHALLENGES TO MILITARY REGULATIONS.

To date, the various circuit courts have adopted primarily two divergent sets of standards for determining whether to permit judicial review of military regulations.[2] In this case, the Eighth Circuit followed the analysis formulated over a decade ago by the Fifth Circuit in Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971). The Third Circuit, however, has recently rejected that approach and adopted a contradictory approach with respect to the issue of justiciability in Dillard v. Brown, 652 F.2d 316 (3d Cir. 1981). Other circuits have surveyed the

---

2 Reviewability and justiciability are used interchangeably. Dillard v. Brown, 652 F.2d 316, 322 n.4 (1981).

applicable conflicting case law and reached the conclusion that, "[t]here is no guidance from the Supreme Court on how to proceed in determining how far the judiciary should inquire into military matters." Lindenau v. Alexander, 663 F.2d 68, 72 (10th Cir. 1981). See, Wallace v. Chappell, 661 F.2d 729, 732 (9th Cir. 1981). This Court, therefore, should grant certiorari to provide the needed guidance and uniformity.

A. The Approach Formulated by the Fifth Circuit in Mindes v. Seaman Improperly Permits a Court to Avoid a Determination on the Merits of the Claim by Invoking the Concept of Justiciability.

In Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971), Air Force Captain Mindes claimed that he had received an erroneous and adverse Officer Effectiveness Report which resulted in his assignment to reserve status. He sought to have the report voided through intraservice

procedures, but to no avail. Subsequently, he filed a Complaint in District Court which the Court dismissed for lack of subject matter jurisdiction. The Fifth Circuit reversed, holding that there was subject matter jurisdiction and noting that not all military affairs are automatically nonreviewable. The Fifth Circuit remanded, instructing the trial court to apply the following test:

> [A] court should not review internal military affairs in the absence of (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion of available intraservice corrective measures.

The Court further noted that the following four additional factors should be examined in deciding whether to review the military decision, namely:

> 1. The nature and strength of the plaintiff's challenge to the military determination. Constitutional claims, normally more important than those having only

a statutory or regulatory base, are themselves unequal in the whole scale of values -- compare haircut regulation questions to those arising in court-martial situations which raise issues of personal liberty. An obviously tenuous claim of any sort must be weighted in favor of declining review.

2. The potential injury to the plaintiff if review is refused.

3. The type and degree of anticipated interference with military function. Interference per se is insufficient since there will always be some interference when review is granted, but if the interference would be such as to seriously impede the military in the performance of vital duties, it militates strongly against relief.

4. The extent to which the exercise of military expertise or discretion is involved. Courts should defer to the superior knowledge and experience of professionals in matters such as promotions or orders directly related to specific military functions.

Id. at 201-02 (citation omitted).

Some form of the Mindes test has been used in several circuits. Lindenau v. Alexander, 663 F.2d 68 (10th Cir. 1981)

(National Guard Regulation precluded single parents with minor dependents from enlisting);[3] Wallace v. Chappell, 661 F.2d 729 (9th Cir. 1981) (Navy enlisted men brought action against superior officers for race discrimination in, e.g. duty assignments and selection for training programs). The Fifth Circuit itself recently expanded application of the

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[3] Even within the Tenth Circuit, however, the Judges disagreed on which test to adopt for reaching decisions in these cases. Judge McKay noted:

> This Fifth Circuit position [Mindes] was developed prior to the decision of the United States Supreme Court in Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, . . . (1979), and, in my view, is no longer tenable. I believe the correct analysis is that posited by the Third Circuit in Dillard v. Brown, 652 F.2d 316 (3rd Cir. 1981), subsequent to Feeney.

Lindenau v. Alexander, 663 F.2d 68, 74-5 (10th Cir. 1981) (concurring opinion) (emphasis added).

Mindes test by using it to decide the reviewability of equal protection claims as well as due process claims. Woodard v. Marsh, 658 F.2d 989 (5th Cir. 1981). Petitioner's claim here involves both types of claims.

B. The Approach Formulated by the Third Circuit in Dillard v. Brown Does Not Preclude a Decision on the Merits by Barring Consideration of the Case as Nonjusticiable.

The Third Circuit explicitly rejected the Mindes approach in Dillard v. Brown, 652 F.2d 316 (3rd Cir. 1981). As in Lindenau, Dillard involved a challenge to a National Guard Regulation forbidding enlistment of single parents of minor children. After reviewing the Mindes test, the Third Circuit declined to adopt the test stating as follows:

> [I]f the military justification outweighs the infringement of the plaintiff's individual freedom, we may hold for the military on the merits, but we will not find claim to be nonjusticiable and therefore not cognizable by a court.

652 F.2d at 323-34 (emphasis added). By finding Dillard's claims justiciable, this holding is in direct conflict with Lindenau and West v. Brown, 558 F.2d 757 (5th Cir. 1977), cert. denied, 435 U.S. 926 (1978), on the facts and with Mindes on the test to be applied. In thus rejecting the Fifth Circuit's approach, the Third Circuit observed:

> We prefer an analysis which does not mingle concepts of justiciability with those affecting the merits of the claim to the extent that Mindes requires. . . . [t]he difficulty which we perceive with the Mindes analysis is that it intertwines the concept of justiciability with the standards to be applied to the merits of the case. As we have pointed out, the Supreme Court in both Gilligan [v. Morgan, 413 U.S. 1 (1973),] and Orloff [v. Willoughby, 345 U.S. 83 (1953),] has established the basic parameters for determining the justiciability of challenges brought against the military. Once a claim falls within these parameters, a court should review the claim on the merits. Even if such constitutional challenge appears weak or frivolous, jurisprudentially that claim should be rejected on the merits, rather than deemed to be nonjusticiable by a federal court.

Dillard v. Brown, 652 F.2d at 323 (emphasis added).

In Gilligan, as a result of the Kent State shootings, the plaintiffs sought "continuing regulatory jurisdiction" over the activities of the Ohio National Guard. 413 U.S. at 5. A plaintiff seeking constitutional review of a military regulation by a federal court engages the court neither in continuing regulation nor in a task for which it has no competence. To the contrary, holding a constitutional challenge unreviewable leaves a plaintiff in the position of asking the military to judge the constitutionality of its own regulations; a task for which the military has no competence.

In Orloff v. Willoughby, 345 U.S. 83, 94 (1953), this Court observed that the military and judicial establishments should maintain a mutual respect for their

respective areas of competence, stating as follows:

> The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

Id. at 94 (emphasis added).

The merits of a constitutional challenge fall particularly within the court's area of competence. Further, a court should consider the justifications for a regulation, offered by military authorities, independently from the regulation's reviewability. A court using the Mindes approach masks a judgment on the merits with a procedural finding of nonreviewability.

The Circuits following Mindes have made much of Orloff's "hands off" language, but have failed to consider the fact that Orloff allowed review of a

constitutional claim. In Orloff, the Army refused to commission a drafted doctor as an officer because he would not divulge whether he was associated with subversive organizations. Simply, Orloff holds that duty assignments will not be reviewed by a court unless there is a statutory or constitutional violation. Therefore, a constitutional challenge to a military regulation where a court is not required to exercise continuing regulatory jurisdiction, is justiciable.

The Second Circuit has taken a position similar to the position taken by the Third Circuit in Dillard. In Crawford v. Cushman, 531 F.2d 1113 (2d Cir. 1976), a Marine challenged a regulation mandating discharge for pregnancy. The court found the regulation invalid on both equal protection and due process grounds. In its discussion of reviewability, the court observed:

> As the Supreme Court demonstrated in Schlesinger v. Ballard, supra, and Frontiero v. Richardson, 411 U.S. 677 . . . (1973), military treatment of personnel in allowing benefits for "dependants" and in discharging officers for failure to achieve promotion is subject to judicial review and to constitutional requirements even though such treatment may equally be a "valid military concern."
>
> In the light of Levy, Ballard, and Frontiero, we find there to be no basis for a judicial deference to the military here which precludes the review of appellant's substantive constitutional claims.

531 F.2d at 1121 (emphais added).

The court in Crawford reached this conclusion based on the same substantive constitutional challenge involved in Lindenau v. Alexander, 663 F.2d 68 (10th Cir. 1981), and West v. Brown, 558 F.2d 757 (5th Cir. 1977) (freedom of personal choice in matters of marriage and family life). The Second Circuit was aware of Mindes but did not adopt its test. Crawford v. Cushman, 531 F.2d 1114, 1120, 1121 n.6 (2d Cir. 1976). Though the facts of the cases were similar to Crawford, the

Fifth Circuit in West v. Brown and the Tenth Circuit in Lindenau, reached an opposite result from the Second Circuit because they applied the Mindes test. The Second Circuit found justiciability; the Fifth and Tenth Circuits found nonjusticiability.

The Second Circuit discussed Orloff and noted the need for Supreme Court guidance in this area, stating:

> To be sure, there is precious little Supreme Court law to tell us which rights clearly held by civilians apply in what circumstances to members of the military community.

531 F.2d at 1120-21.

Petitioner suggests that the instant matter is a most appropriate vehicle to establish and illuminate this Court's position on the issue.

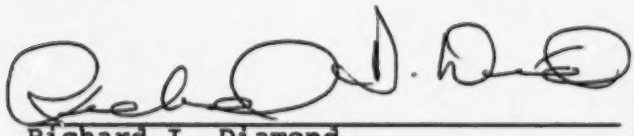
CONCLUSION

Petitioner respectfully requests that the United States Supreme Court grant the within Petition for Writ of Certiorari to

review the decisions of the United States Court of Appeals for the Eighth Circuit. This Court should provide the needed guidance by addressing the growing split in the circuits' approaches to the issue of the reviewability or justiciability of military regulations, exemplified by the Fifth Circuit in Mindes and the Third Circuit in Dillard.

Respectfully submitted,

LARKIN, HOFFMAN, DALY & LINDGREN, Ltd.



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DEPARTMENT OF THE AIR FORCE
HEADQUARTERS 934TH TACTICAL AIRLIFT GROUP (AFRES)
MINNEAPOLIS-ST PAUL IAP, MINNEAPOLIS, MN 55450

[illegible]

13 February

Subject: Notification of Ineligibility for Reenlistment

To: SMGT John P. Mcnamar
[illegible] Bimini Ave
St. Paul, MN 55104

Your qualification for reenlistment [illegible] is hereby withdrawn. [illegible] that you are not eligible for reenlistment or extension of enlistment under [illegible] AFR 39-17 which states that an individual [illegible] who [illegible]

[illegible]
LLOYD H. [illegible], Lt, USAFR
Chief, [illegible]

Best Copy Available

[Available copies of Lt. Miller's letter are faded and will not reproduce. The following is a true and correct artifact of his letter.]:

REPLY TO
ATTN OF DFMQ 13 February 1978

SUBJECT Notification of Ineligibility for Commissioning Program

TO TSGT John F. Nieszner
854 Edmund Ave
St. Paul, MN 55104

Your qualifications for commissioning are excellent and your interest in the program is appreciated, however, I regret to inform you that you exceed the age requirements for commissioning as outlined by para 2-11(d)(3), Chap 2, AFR 36-15 which states that an applicant must not exceed age 35.

/s/

LLOYD H. MILLER, 1Lt, USAFR
Chief, CBPO

DEPARTMENT OF THE AIR FORCE HEADQUARTERS
442D TACTICAL AIRLIFT WING (AFRES)
RICHARDS-GEBAUR AIR FORCE BASE
MISSOURI 64080

IG 23 June 1978

Review of Age Discrimination Complaint

TSgt John F. Nieszner
854 Edmund Avenue
St. Paul, Minnesota 55104

1. 934 TAG/IG letter dated 4 June 1978, Subject: Age Discrimination, accompanied by AF Form 1482, dated 28 April 1978, and four attachments, was received in this office on 21 June 1978.

2. I have reviewed the complaint in accordance with paragraph 4a(4) of AFR 123-11, and my findings are as follows:

a. The complaint is specifically against the age requirements for the commissioning program contained in AFR 36-15.

b. The Inspector General Complaint System, AFR 123-11, does not provide for processing of complaints against Air Force regulations. (Reference para 4a(2), 4th and 5th sentences which state: "If the complaint is about an Air Force regulation or statute, the inspector may answer by explaining the regulation or statute to the complaintant. If the individual wants to make a change to a regulation, the inspector should encourage that person to make a suggestion under the USAF Suggestion Award Program.")

c. The 934 TAG/IG processed your complaint properly under the provisions of AFR 123-11.

d. The "Facts Determined" block of AF Form 1482 indicates you have submitted the item under the USAF Suggestion Award Program, which is the method recommended by AFR 123-11. Eligibility of suggestions is contained in para 3-1, Chap 3, AFR 900-4. Note that the suggestion would not be eligible if submitted as a complaint (Reference para 3-3d, Chap 3, AFR 900-4).

JERRY D. OBERHELMAN, Colonel, USAFR
Inspector General

Cy to: 934 TAG/IG

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

JOHN F. NIESZNER,

Plaintiff,

v. MEMORANDUM ORDER

HANS MARK, Secretary of the Air Force,

Defendant.

JOHN S. CONNOLLY, Esq., St. Paul, Minnesota, appeared for plaintiff.

John M. Lee, United States Attorney, by DEBORAH S. KLEINMAN, Assistant U.S. Attorney, Minneapolis, Minnesota, appeared for defendant.

This matter comes before the court upon the motion of defendant for dismissal of plaintiff's claims pursuant to Rules 12(b)(1) and 12(b)(6) of the Fed. R. Civ. P. on the grounds that the court lacks subject matter jurisdiction, and that the complaint fails to state a claim on which relief may be granted. Defendant moves in

the alternative for summary judgment, pursuant to Rule 56 of the Fed. R. Civ. P., on the ground that the defendant is entitled to judgment as a matter of law. Specifically, defendant seeks dismissal as to the plaintiff's claims of discrimination on the basis of age under Air Force Regulation 36-15, paragraph 2-14(c)(3).

Plaintiff John F. Nieszner is a Technical Sergeant in the United States Air Force.

Defendant Hans Mark is Secretary of the Air Force.

The Motion for dismissal asserts that the plaintiff's attack on AFR 36-15 presents a non-justiciable, non-reviewable controversy. The Constitution delegates the authority for running the military to the Congress and the Executive. See Article I §8, cls. 12-14; Article II, §2, Constitution. Case law holds that the courts must be careful not to interfere

with the internal affairs of the military. Gilligan v. Morgan, 413 U.S. 1 (1973); Orloff v. Willoughby, 345 U.S. 83 (1953). Statutory law delegates some of the Congressional power to the armed service Secretaries. 10 U.S.C. §591(b) reserves the prescription of physical, mental, moral, professional and age qualifications for appointment of persons as reserves of armed forces to the jurisdiction of the Secretary.

The plaintiff offers the conclusion that this matter is justiciable because it involves a Constitutional challenge to the Air Force regulation on Fifth Amendment grounds.

The issue of the appropriateness of judicial review of internal military affairs was addressed by Judge Edward J. Devitt in Doe v. Alexander, 510 F.Supp. 900 (D. Minn. 1981). Judge Devitt analyzed the due process and equal protec-

tion aspects of the case in light of a four-factor test presented in Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971).

The four factors are:

1. The nature and strength of the plaintiff's challenge.

In this case, the plaintiff challenges the regulation on Fifth Amendment grounds, but there is no constitutional right to be commissioned in the Air Force Reserve or to serve in the armed forces at all. Doe v. Alexander, 510 F.Supp. at 904; Pauls v. Secretary of the Air Force, 457 F.2d 294, 297 (1st Cir. 1972); Orloff v. Willoughby, 345 U.S. 83, 90 (1953).

2. The potential injury to plaintiff if review is declined.

The plaintiff contends that if he were commissioned, it is likely he would have been appointed as captain. Since such an appointment is a matter of Presidential discretion, 10 U.S.C. §593, plaintiff's injury is speculative.

3. The degree of interference with military function.

4. The extent of military expertise or discretion involved.

The need for a young, vigorous officer force is a Congressional determination. 10 U.S.C. §591 provides that the Secretary shall prescribe qualifications for appointment. These include age restrictions. Courts should defer to the superior knowledge of experienced military professionals in matters such as promotions. Mindes v. Seaman, 453 F.2d 197, 202 (1971).

The Eighth Circuit upheld application of the Mindes text in Henson v. Alexander, 478 F.Supp. 1044 (1979).

In view of this test, and in view of the fact that professional military judgments are subject to civilian control of the Legislative and Executive Branches,

Gilligan v. Morgan, 413 U.S. 1 (1973), we find plaintiff's claim is not reviewable.

Upon the foregoing,

IT IS ORDERED That defendant's motion for dismissal is granted on grounds that it fails to state a claim upon which relief may be granted.

DATED: October 14, 1981.

Donald D. Alsop
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-2343

John F. Nieszner,

Appellant,

v.

Hans Mark, Secretary of the Air Force,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

Submitted: May; 20, 1982

Filed: July 21, 1982

Before BRIGHT, Circuit Judge; FLOYD R. GIBSON, Senior Circuit Judge; and ARNOLD, Circuit Judge.

BRIGHT, Circuit Judge.

John F. Nieszner appeals from the district court's[1] dismissal of his age discrimination claim against the Air Force. Nieszner seeks to challenge Air

Force Regulation 36-15, ¶2-14(c)(3) (1978) (AFR 36-15), which requires an applicant for a commission program to "[b]e appointed as a commissioned officer before reaching age 35." The district court dismissed Nieszner's complaint for failure to state a claim on which relief may be granted. We affirm.

I. Background.

Nieszner, a technical sergeant in the Air Force Reserve, applied for an opening in the Outstanding Airmen Commissioning Program in February of 1978. Although Nieszner fulfilled the various educational and testing requirements specified in the regulations, he alleges that the Air Force unfairly turned him down solely because at age thirty-six, he was too old to qualify under AFR 36-15.

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[1]The Honorable Donald D. Alsop, United States District Judge for the District of Minnesota.

After Nieszner's pursuit of relief through intraservice grievance procedures proved unsuccessful, he filed a complaint in the district court seeking a declaratory judgment, preliminary and permanent injunctions, and money damages for alleged infringements of his constitutional rights. Specifically, Nieszner claimed that AFR 36-15 imposes an arbitrary and irrational age limitation, and that its application to him constitutes age discrimination in violation of his rights under the fifth and fourteenth amendments. The district court deemed the challenged regulation inappropriate for judicial review, and dismissed the complaint.

On appeal Nieszner argues that he presented a justiciable, constitutional claim against the military which the district court should have considered on the merits.

II. Discussion.

In dismissing Nieszner's claim, the district court relied on Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971), in which the Fifth Circuit noted the traditional judicial reluctance to interfere with internal military affairs.

> What we really determine is a judicial policy akin to comity. It is a determination made up of several subjective and inter-related factors. Traditional judicial trepidation over interfering with the military establishment has been strongly manifested in an unwillingness to second-guess judgments requiring military expertise and in a reluctance to substitute court orders for discretionary military decisions. Concern has also been voiced that the courts would be inundated with servicemen's complaints should the doors of reviewability be opened. But the greatest reluctance to accord judicial review has stemmed from the proper concern that such review might stultify the military in the performance of its vital mission. [Mindes v. Seaman, supra, 453 F.2d at 199.]

Recognizing, however, that "the courts have not entirely refrained from granting

review and sometimes subsequent relief[,]" id., the Mindes court considered a range of cases reflecting the competing policies for and against judicial review of claims against the military. Id. at 199-201. From these, the court distilled a two-part test for determining whether to review such claims.

First, a plaintiff challenging an internal military decision must allege a violation of the Constitution, a statute, or military regulation, and demonstrate exhaustion of intra-service remedies. If a plaintiff satisfies the first step, the trial court must then balance four factors to determine the claim's suitability for judicial review: (1) the nature and strength of the plaintiff's challenge to the military determination, (2) the potential injury to the plaintiff if review is refused, (3) the type and degree of anticipated interference with the

military function, and (4) the extent to which the exercise of military expertise or discretion is involved. Id. at 201-02.

In balancing the four Mindes factors,[2] the district court stated first that Nieszner had not presented a constitutional claim, because there exists no constitutional right to serve in the Armed Forces.[3] Secondly, the court concluded that the potential injury to the plaintiff remained speculative if the court denied review, because his appointment, if

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[2]Applying the Mindes analysis in this case, the district court bypassed the first level of inquiry, and began directly balancing the four factors of step two. We note, however, that Nieszner had satisfied the first step of the Mindes test because he alleged that the application of AFR 36-15 to him denied him due process and equal protection, and he exhausted his intraservice remedies.

[3]Nieszner asserted no statutory claim of age discrimination, nor did he contend that the application of AFR 36-15 to him violated any military regulation. Consequently, we frame our discussion of Mindes in terms of constitutional claims only.

commissioned, falls within the President's discretion. On the final two Mindes factors the court deferred to "the superior knowledge of experienced military professionals in matters such as promotions[,]" and dismissed Nieszner's claim as nonreviewable.

On appeal Nieszner urges this court to reject the Mindes analysis and adopt instead the Third Circuit's approach outlined in Dillard v. Brown, 652 F.2d 316 (3d Cir. 1981). The Third Circuit rejected the Mindes analysis on the ground that "it intertwines the concept of justiciability with the standards to be applied to the merits of the case." Id. at 323.

We do not agree with the Third Circuit's conclusion that the Mindes analysis requires the court to consider the merits of a case in making a threshold determination of reviewability. Although

the second step of the Mindes analysis directs courts to consider "[t]he nature and strength of the plaintiff's challenge to the military determination," Mindes v. Seaman, supra, 453 F.2d at 201, this does not require an evaluation of the merits of the claim presented. Rather, the court must consider whether the plaintiff has presented a claim substantial enough to warrant judicial intrusion into military matters.

> Constitutional claims, normally more important than those having only a statutory or regulatory base, are themselves unequal in the whole scale of values--compare haircut regulation questions to those arising in court-martial situations which raise issues of personal liberty. An obviously tenuous claim of any sort must be weighted in favor of declining review. [Id. (citations omitted).]

The Fifth Circuit's application of these factors in a subsequent opinion clarified the limited scope of this inquiry. In evaluating the nature and

strength of a claim that an Army regulation barring enlistment of unwed parents of minor children unconstitutionally burdens the right to marry and have children, the court noted that there is no constitutional right to join the military, West v. Brown, 558 F.2d 757, 760 (5th Cir. 1977), cert. denied, 435 U.S. 926 (1978), and that the Supreme Court has upheld rational restrictions on non-contractual government benefits and services that do not enjoy constitutionally protected status. Id. Because the regulation seemed reasonable in light of military needs, the court concluded that the plaintiff did not have a strong claim. Id. The court stated, however, that its determination did not amount to a prejudgment on the merits: "While we do not here hold that the plaintiffs' constitutional claim lacks merit, we hold that the claim is not powerful; rather it is tenuous." Id.

Similarly, in this case, the district court observed that "there is no constitutional right to be commissioned in the Air Force Reserve or to serve in the Armed Forces at all. Doe v. Alexander, 510 F.Supp. at 904; Pauls v. Secretary of the Air Force, 457 F.2d 294, 297 (1st Cir. 1972); Orloff v. Willoughby, 345 U.S. 83, 90 (1953)." Nieszner v. Mark, 3-80 Civ. 532, slip op. at 2 (D. Minn. Oct. 14, 1961) (emphasis added). The court thereby indicated that the regulation at issue did not affect a constitutional right, making Nieszner's claims tenuous at best. The court did not consider the likelihood of Nieszner's success in proving tht AFR 36-15 violated his constitutional rights. Rather, the court determined only that the regulation did not implicate a constitutional right as Nieszner contended.

Remaining mindful that the Constitution applies to the military, see Crawford

v. Cushman, 531 F.2d 1114, 1120 (2d Cir. 1976), we nevertheless share the traditional reluctance to interfere in military affairs.

> [J]udges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. [Orloff v. Willoughby, 345 U.S. 83, 93 (1953).]

We believe that the Mindes analysis for determining justiciability of claims against the military fairly accommodates these competing interests. Applying the Mindes test, the district court properly determined that Nieszner presented a non-

reviewable claim. Accordingly, we affirm the district court's dismissal of the complaint.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[AFR 36-15, paragraph 2-14]

2-14. Appointment of USAFR Airmen Not on EAD.
Direct appointment of qualified and deserving airmen not on EAD to officer status and a concurrent Ready Reserve assignment may be made under these criteria:

a. Quotas. HQ USAF/DPXXOA announces fiscal year quotas and any changes.

b. Restrictions on Appointments. Appointments are subject to these limitations:

(1) They may not be made in specialities specified in chapters 4, 5, 6, 7, and 8.

(2) They are restricted to the grade of second lieutenant.

c. Eligibility Criteria. In addition to meeting the prescribed moral, citizenship, medical, age, educational, and testing requirements (paragraphs 2-1 and 3-3), an applicant must:

(1) Have completed:

(a) One good year of the military service obligation (see AFR 35-41, volume II, chapter 1, paragraph 1-3).

(b) Air Forces Officer Preparatory Course through the Extension Course Institute (ECI).

(2) Agree in writing that, if appointed as an officer, to meet the

training requirements of the training category in which assigned, and remain assigned for 3 years in training category A, B, or D. (Failure to participate for reasons within member's control may result in discharge action under AFR 35-41, volume III, chapter 2.)

(3) Be appointed as a commissioned officer before reaching age 35.

(4) Have a baccalaureate degree. (An applicant enrolled in the senior year of college is eligible, but must furnish an official transcript or certification from the registrar that graduation is expected on or before the end of the fiscal year of selection. If otherwise qualified, such an applicant may be conditionally tendered an appointment. After conditional tender of appointment and following graduation, the individual must furnish evidence that the qualifying degree has been conferred and all other applicable requirements are met.) A non-commissioned officer (NCO) also must be a graduate of a recognized NCO academy.

(5) Be tentatively selected for assignment to a vacant lieutenant or captain position in a training category A unit or an authorized mobilization augmentee (MA) position in a Regular Air Force unit.

d. Administrative Actions:

(1) On discharge of an airman to accept appointment under this program, the servicing CBPO sends the Field Record Group (FRGp) to HQ ARPC/DPFDA, 7300 E. First Avenue, Denver CO 80280.

(2) HQ AFRES must inform a selectee who is an Air Reserve technican (ART) that, if appointment is accepted, the ART position must be vacated.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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FILED
FEB 16 1983
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CLERK

No. 82-1007

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN F. NIESZNER, PETITIONER

v.

VERNE ORR, SECRETARY OF THE AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
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Washington, D.C. 20530
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Petitioner contends that the court of appeals erred in dismissing his challenge to an Air Force regulation that imposes an age limitation on admission to the Outstanding Airmen Commissioning Program.

1. Petitioner, a technical sergeant in the Air Force Reserve, was denied a position in the Outstanding Airmen Commissioning Program on the ground that he was 36 years old; an Air Force regulation requires that applicants for this program not have reached age 35 (Pet. App. E-2). Petitioner then brought this suit in the United States District Court for the District of Minnesota, asserting that

the regulation was unconstitutional and seeking declaratory and injunctive relief.[1]

The district court dismissed the complaint, holding that petitioner's claim "is not reviewable" (Pet. App. D-3). In reaching this conclusion, the court applied the "four-factor test" for the reviewability of military actions prescribed by *Mindes* v. *Seaman*, 453 F.2d 197 (5th Cir. 1971). The first factor is "[t]he nature and strength of the plaintiff's challenge"; the district court ruled that this factor militated against reviewability because "there is no constitutional right to be commissioned in the Air Force Reserve or to serve in the armed forces at all" (Pet. App. D-2). The second factor is "[t]he potential injury to plaintiff if review is declined"; the district court concluded that petitioner's "injury is speculative" because the ultimate decision whether

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[1]Petitioner also sought $500,000 in damages "against the Defendants" (Complaint 3). The complaint does not specify whether damages were sought from the defendants in their personal capacity or in their official capacity. But one of the named defendants was dismissed from the case by stipulation of the parties, and the other named defendant was respondent's predecessor as Secretary of the Air Force; petitioner has substituted respondent (Pet. 2). The complaint contains no allegation that either respondent or his predecessor was personally involved in the alleged wrongs of which petitioner complains. It therefore appears that petitioner does not seek damages against any official personally. Neither the district court nor the court of appeals treated the complaint as presenting a personal damages claim. See *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

We note that the district court lacked jurisdiction over a claim for damages against the United States (or against respondent in his official capacity) both because the government has not waived its sovereign immunity from damages claims based on alleged violations of the Due Process Clause of the Fifth Amendment (see, *e.g.*, *United States* v. *Testan*, 424 U.S. 392, 400-402 (1976); *Duarte* v. *United States*, 532 F.2d 850, 852 (2d Cir. 1976)) and because a claim for $500,000 in damages from the United States would have to be brought in the United States Claims Court (28 U.S.C. 1346(a)(2) and 1491).

to appoint him an officer would have been "a matter of Presidential discretion" (*ibid.*). The third and fourth factors are "[t]he degree of interference with military function[s]" and "[t]he extent of military expertise or discretion involved"; with respect to these factors, the district court noted the "need for a young, vigorous officer force," and commented: "Courts should defer to the superior knowledge of experienced military professionals in matters such as promotions." *Id.* at D-3.

The court of appeals affirmed (Pet. App. E-1 to E-6; 684 F.2d 562). Describing petitioner's constitutional claim as "tenuous at best" (*id.* at E-5), the court of appeals endorsed the district court's application of the *Mindes* test (*id.* at E-5 to E-6).

2. Petitioner makes no argument designed to show that the court of appeals should have sustained his constitutional challenge to the Air Force's age limitation. Moreover, petitioner does not dispute the premises of the decisions of the court of appeals and the district court — that his constitutional claim is insubstantial, that his alleged injury is speculative, and that the military judgments that the age limitation reflects are entitled to deference. Instead, petitioner asserts (Pet. 9-10, 14-15) only that his claim is justiciable and that the court of appeals' decision conflicts with *Dillard* v. *Brown*, 652 F.2d 316 (3d Cir. 1981). But *Dillard* did not involve a challenge to military promotions, commissions, or distinctions based on age, and petitioner points to nothing in *Dillard* suggesting that his claim would have fared better before the *Dillard* court.

The court of appeals in *Dillard* "decline[d] to adopt the [*Mindes* v. *Seaman*] formula" on the ground that *Mindes* "intertwines the concept of justiciability with the standards to be applied to the merits of the case." 652 F.2d at 323. The *Dillard* court stated (*ibid.*): "Even if * * * a constitutional

challenge appears weak or frivolous, jurisprudentially that claim should be rejected on the merits, rather than deemed to be non-justiciable by a federal court." The differences between, on the one hand, the approach of *Mindes* and the court below, which consider "reviewability" or "justiciability," and, on the other hand, the *Dillard* court's concern with the merits, appear to be more a matter of terminology than substance: both approaches require a court to consider the substantiality of the plaintiff's claim, the extent to which the challenged action or determination reflects military expertise, and the importance of the parties' respective interests.[2] It is far from clear that the two approaches even attach different weight to these various considerations. This Court's decisions have taken into account essentially the same considerations, and often have recognized that a determination not to intrude courts into military affairs can derive not only from the merits of a claim but also from concerns similar to those underlying the political question doctrine and other aspects of justiciability. See, *e.g.*, *Gilligan* v. *Morgan*, 413 U.S. 1, 10-12 (1973). See also *Rostker* v. *Goldberg*, 453 U.S. 57, 64-66 (1981); *Orloff* v. *Willoughby*, 345 U.S. 83, 88-95 (1953).[3]

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[2]Cf. *Flast* v. *Cohen*, 392 U.S. 83, 95 (1968), quoting *Poe* v. *Ullman*, 367 U.S. 497, 508 (1961) ("Justiciability is itself a concept of uncertain meaning and scope. * * * 'Its utilization is the resultant of many subtle pressures * * *' ").

[3]Petitioner also relies (Pet. 18-20) on *Crawford* v. *Cushman*, 531 F.2d 1114 (2d Cir. 1976). But the court in *Crawford*, like the court below, considered the question of reviewability to be distinct from the merits. See *id.* at 1119-1121. Petitioner's suggestion (Pet. 19) that the Second Circuit rejected the *Mindes* approach is incorrect. The claim in *Crawford* was found reviewable; but it concerned alleged discrimination on the basis of sex and an alleged deprivation of an interest that the Second Circuit considered to be constitutionally protected. See 531 F.2d at 1121.

In any event, whatever the divergence between the court of appeals' approach and that of *Dillard* on the abstract, "jurisprudential[]" level (*Dillard* v. *Brown, supra,* 652 F.2d at 323), petitioner fails to show why the *Dillard* approach would be more favorable to him. The government has great latitude in classifying on the basis of age (see *Vance* v. *Bradley,* 440 U.S. 93, 97 (1979); *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307, 312-314 (1976)); the Air Force's age limitation is plainly related to the objective of maintaining a young officer corps, particularly among the junior grades; and courts are not well equipped to second-guess military judgments about the importance of that objective. See *Rostker* v. *Goldberg, supra,* 453 U.S. at 64-68, 70-71. There is accordingly no reason to believe that petitioner's claim would succeed "on the merits" to any greater extent than it did in the courts below.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FEBRUARY 1982

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[4]As we noted (page 2 note 1, *supra*), petitioner's treatment of the damages claim in this case suggests that it is not a *Bivens*-type personal damages claim. The question presented in *Chappell* v. *Wallace,* cert. granted, No. 82-167 (Nov. 1, 1982), is therefore not implicated here. In any event, even if the complaint were read to state a claim for damages against respondent personally, petitioner's contention would not merit review by this Court for the reasons we have stated above, irrespective of the disposition of *Chappell.* Moreover, even if this Court were to uphold the Ninth Circuit's ruling in *Chappell* that the reviewability of military actions in the context of a personal damages suit should be judged by application of the four-factor *Mindes* test, it would not assist petitioner, because the court below dismissed his complaint after applying the *Mindes* standards.

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